Office - Supreme Court, U.S.
FILED
OCT 17 1984
ALEXANDER L. STEVAS
CLERK

No. 84-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA WILLIAMS,
Appellants,

v.

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

---

BRIEF FOR APPELLANTS

CHARLES H. WILSON
Counsel of Record

MICHAEL P. MADOW
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Appellants

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for all educationally deprived children in low-income areas, violates the Establishment Clause of the First Amendment insofar as it permits the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.*

---

* The Secretary of the United States Department of Education and the Chancellor of the Board of Education of the City of New York, both of whom were defendants in the district court and appellees in the court of appeals, have filed separate appeals in this action. *Secretary, United States Department of Education* v. *Felton*, No. 84-238, October Term, 1984, and *Chancellor of the Board of Education of the City of New York* v. *Felton*, No. 84-239, October Term, 1984.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. The Federal Title I Program	3
B. New York City's Title I Program	5
1. Reasons for an On-Premises Program	7
2. Title I Teachers	8
3. Title I Classrooms, Equipment, and Materials	10
4. Private Schools Attended by Title I Students	10
5. Contacts Between Title I Administrators and Private School Officials	11
C. The Proceedings Below	12
SUMMARY OF ARGUMENT	14
ARGUMENT	17
I. GOVERNING CONSTITUTIONAL PRINCIPLES	17
A. "No Fixed, *Per Se* Rules"	17
B. Neutrality and Accommodation	24
II. THE THREE-PART TEST	27
A. Purpose	28
B. Primary Effect	29

TABLE OF CONTENTS—Continued

	Page
1. Direct Aid to Students	29
2. Broad Class of Beneficiaries	31
3. Restriction of Aid to Secular Activities	33
C. Entanglement	38
1. Administrative Entanglement	38
(a) Institutions Affected	39
(b) Form of Aid	40
(c) Relationship Between the Government and the Religious Authority	42
2. Political Entanglement	48
CONCLUSION	50

TABLE OF AUTHORITIES

Cases: Page

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 20-21, 25, 39, 44
Americans United for the Separation of Church and State v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.), *summarily aff'd*, 434 U.S. 803 (1977) .. 26-27, 30
Board of Education v. *Allen*, 392 U.S. 236 (1968) .. 19, 30-31, 33
Bradfield v. *Roberts*, 175 U.S. 291 (1899) 19
California v. *Grace Brethren Church*, 457 U.S. 393 (1982) 2
Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973) 19, 24, 26, 30-31, 36, 49
Committee for Public Education v. *Regan*, 444 U.S. 646 (1980) 14, 17, 21, 39, 41, 46
Everson v. *Board of Education*, 330 U.S. 1 (1947) .. 19, 26, 30-31
Flast v. *Cohen*, 392 U.S. 83 (1968) 2
Hunt v. *McNair*, 413 U.S. 734 (1973) 31, 33
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) ..... *passim*
Levitt v. *Committee for Public Education*, 413 U.S. 472 (1973) 36
Lynch v. *Donnelly*, 104 S. Ct. 1355 (1984) ..... *passim*
Marsh v. *Chambers*, 103 S. Ct. 3330 (1983) 14, 20-21, 24, 28, 38
McCollum v. *Board of Education*, 333 U.S. 203 (1948) 17-18
McDaniel v. *Paty*, 435 U.S. 618 (1978) 25-26
McLucas v. *DeChamplain*, 421 U.S. 21 (1975) 2
Meek v. *Pittenger*, 421 U.S. 349 (1975) ..... *passim*
Mueller v. *Allen*, 103 S. Ct. 3062 (1983) ..... *passim*
National Coalition for Public Education and Religious Liberty v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) ..... *passim*
Nebraska State Board of Education v. *School District of Hartington*, 188 Neb. 1, 195 N.W.2d 161, *cert. denied*, 409 U.S. 921 (1972) 45, 47
Public Funds for Public Schools v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *summarily aff'd*, 417 U.S. 961 (1974) 46

TABLE OF AUTHORITIES—Continued

Page

Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) 19, 24, 39-40
Sherbert v. *Verner*, 374 U.S. 398 (1963) 27
Sloan v. *Lemon*, 413 U.S. 825 (1973) 29
Tilton v. *Richardson*, 403 U.S. 672 (1971) 22, 37, 40, 48-49
Walz v. *Tax Commission*, 397 U.S. 664 (1970) 17, 19-20, 22-25, 43, 48
Wheeler v. *Barrera*, 417 U.S. 402 (1974) ..... *passim*
Wolman v. *Walter*, 433 U.S. 229 (1977) 21, 30, 44-45, 48
Zorach v. *Clauson*, 343 U.S. 306 (1952) 15, 19-20, 24-27

Statutes:

Elementary and Secondary Education Act of 1965, Title I, 20 U.S.C. §§ 2701 *et seq.* (1982) 3
20 U.S.C. § 2701 (1982) 3, 28
20 U.S.C. §§ 2732-34 (1982) 32
Education Consolidation and Improvement Act of 1981, Chapter 1, 20 U.S.C. §§ 3801 *et seq.* (1982) 3
20 U.S.C. § 3801 (1982) 4, 28
20 U.S.C. § 3803 (1982) 3
20 U.S.C. § 3804(a) (1982) 4
20 U.S.C. § 3804(c) (1982) 4
20 U.S.C. § 3805 (1982) 4
20 U.S.C. § 3805(b) (1982) 4
20 U.S.C. § 3806 (1982) 26
20 U.S.C. § 3806(a) (1982) 4, 32
20 U.S.C. § 3806(b) (1982) 2
20 U.S.C. § 3807(b) (1982) 4, 6
Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752 2
28 U.S.C. § 1252 2
28 U.S.C. § 2103 2
28 U.S.C. § 2282 (1970 ed.) 2

TABLE OF AUTHORITIES—Continued

Regulations: Page

34 C.F.R. §§ 200.70 *et seq.* (1983) 34
34 C.F.R. § 200.70(a) (1) (1983) 4
34 C.F.R. § 200.70(d) (1) (1983) 5, 34
34 C.F.R. § 200.71 (1983) 4, 26
34 C.F.R. § 200.71(a) (1983) 27, 32
34 C.F.R. § 200.71(b) (1983) 2, 27, 31
34 C.F.R. § 200.72(a) (1983) 4
34 C.F.R. § 200.72(b) (1983) 5
34 C.F.R. § 200.72(b) (1) (1983) 34
34 C.F.R. § 200.73 (1983) 5
34 C.F.R. § 200.74(a) (1983) 5, 34
34 C.F.R. § 200.74(c) (1) (1983) 5
34 C.F.R. § 200.75 (1983) 34

Articles:

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513 (1968) 20
Kelley and Lanoue, *The Church-State Settlement in the Federal Aid to Education Act*, 1965 Religion and the Public Order 110 49
The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47 (1975) 38

Miscellaneous:

Hearings on Aid to Elementary and Secondary Education Before the General Subcommittee on Education of the House Committee on Education and Labor, 89th Cong., 1st Sess. 841 (1965) 29
111 Cong. Rec. 5567 (1965) 30
S. Rep. No. 146, 89th Cong., 1st Sess. 5, *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446 ..... 3-5, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-237

YOLANDA AGUILAR, LILLIAN COLON,
MIRIAM MARTINEZ and BELINDA WILLIAMS,
Appellants,

v.

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE and ALLEN H. ZELON,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 739 F.2d 48 (1984) and appears as Appendix A to the Jurisdictional Statement of the Solicitor General of the United States.[1] The decision of the United States District Court for the Eastern District of New York is unreported and appears as Appendix B to the Jurisdictional Statement of the Solicitor General.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1984. (S.G. App. 104a). These appellants filed their Notice of Appeal with the court of appeals on August 2, 1984. (JA 293). On October 9, 1984, the Court ordered this case consolidated for argument with

[1] References to the Appendix to the Jurisdictional Statement of the Solicitor General will be in the form "S.G. App." References to the Joint Appendix will be in the form "JA."

Secretary, United States Department of Education v. *Felton*, No. 84-238, and *Chancellor of the Board of Education of the City of New York* v. *Felton*, No. 84-239, and postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits. —— U.S. —— (1984). Jurisdiction is invoked under 28 U.S.C. 1252.[2]

---

[2] In view of the jurisdictional argument made in the brief of the Solicitor General in No. 84-238, which these appellants hereby adopt, it is sufficient to set forth briefly the considerations that support this Court's jurisdiction under § 1252. First, Title I authorizes, and Congress specifically contemplated, the expenditure of federal funds for on-premises instruction of the very kind held unconstitutional by the court of appeals. *See Wheeler* v. *Barrera*, 417 U.S. 402, 422-23 (1974). Second, a central purpose of the Title I program is to assure that private school children receive remedial services comparable to those enjoyed by public school children. *See* 20 U.S.C. § 3806(b) (1982) and 34 C.F.R. § 200.71(b) (1983). The record in this case shows that this congressional purpose can be achieved only by on-premises instruction. Third, the Secretary of Education is clearly "bound" by the holding of unconstitutionality below. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). *See California* v. *Grace Brethren Church*, 457 U.S. 393, 404-07 (1982). Indeed, the court of appeals expressly contemplated that the City would now propose and the Secretary approve an off-premises plan. (S.G. App. 54a). Fourth, in *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968), the Court held that a claim that New York City's Title I program violated the Establishment Clause—the same claim made by plaintiffs here—was properly brought before a three-judge court under 28 U.S.C. § 2282 (1970 ed.). Section 2282, which was enacted as part of the same statute as § 1252, *see* Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752, provided for a three-judge court when an injunction was sought against the enforcement of an Act of Congress on grounds of unconstitutionality. Fifth, because the decision of the court of appeals "cast[s] sufficient doubt on similar programs elsewhere as to cause confusion approaching paralysis to surround" Title I, the "legislative policy" underlying § 1252 would be served by the exercise of this Court's appellate jurisdiction. *Flast* v. *Cohen*, *supra*, 392 U.S. at 90.

If the Court determines that jurisdiction by appeal does not lie, appellants request that the Court treat their Jurisdictional Statement as a petition for certiorari and grant the petition. 28 U.S.C. § 2103.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set forth in Appendix F to the Jurisdictional Statement of the Solicitor General.

STATEMENT OF THE CASE

A. The Federal Title I Program

Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, *as amended*, 20 U.S.C. §§ 2701 *et seq.* (1982),[3] was the centerpiece of a congressional effort to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 146, 89th Cong., 1st Sess. 5, *reprinted in* [1965] U.S. Code Cong. & Ad. News 1446, 1450 (quoting from President Johnson's education message). Having determined that "there is a close relationship between conditions of poverty and lack of educational development," *id.*, Congress enacted Title I to provide financial assistance to local educational agencies "serving areas with concentrations of children from low-income families." 20 U.S.C. § 2701 (1982). By enabling local educational agencies to "expand and improve" their programs for "meeting the special educational needs of educationally deprived children," *id.*, Title I was to be a "very potent instrument . . . in the eradication of poverty and its ef-

---

[3] Effective October 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act ("Chapter 1"), which was enacted as Title V, Subtitle D of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 464 (1981) (codified at 20 U.S.C. §§ 3801 *et seq.* (1982)). However, Chapter 1 incorporates by reference many sections of former Title I, *see* 20 U.S.C. § 3803 (1982), and includes virtually identical provisions governing participation of private school students. (S.G. App. 3a n.1). Because the evidence that constitutes the record in this case was developed prior to the enactment of Chapter 1 and because the references in that evidence and in the opinions of the courts below identify the program as "Title I," that designation of the program will be used throughout this brief.

fects." S. Rep. No. 146, *supra*, at p. 5. *See* 20 U.S.C. § 3801 (1982).

Congress appropriates Title I funds annually to support programs proposed by local educational agencies ("LEAs") and approved by state educational agencies ("SEAs"). 20 U.S.C. § 3805 (1982). In a recent fiscal year, Congress appropriated more than three billion dollars to Title I. (JA 228). To receive state approval, the local program proposal, among other requirements, must be designed to meet the special educational needs of economically and educationally deprived children,[4] 20 U.S.C. §§ 3804(a) and (c) (1982), 3805(b) (1982), must supplement rather than supplant nonfederally funded programs, 20 U.S.C. § 3807(b) (1982); 34 C.F.R. § 200.72(a) (1983), and must extend program services on an equal and equitable basis to eligible children who attend private schools, 20 U.S.C. § 3806(a) (1982); 34 C.F.R. § 200.71 (1983).[5] *See Wheeler* v. *Barrera*, *supra*, 417 U.S. at 405-07.

Although the LEA has primary responsibility for the design and implementation of a program fulfilling the requirement that private school children participate in Title I services on an "equitable basis" with public school children, 34 C.F.R. § 200.70(a)(1) (1983); *see Wheeler*, *supra*, 417 U.S. at 406-07, it must comply with

---

[4] A child is considered economically disadvantaged if he resides in an area that has a high concentration of low-income families, and educationally disadvantaged if he is performing at a level below normal for his age. (S.G. App. 5a). Only children who satisfy these dual eligibility criteria can qualify for Title I remedial services of the kind at issue in this case.

[5] Congress was aware that many children from low-income areas attend private schools. *See Wheeler, supra*, 417 U.S. at 405-06. To ensure that needy private school children would be included equally in Title I's benefits, Congress provided that an LEA's expenditures "for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in [its] public schools." 20 U.S.C. § 3806(a) (1982). *See* 34 C.F.R. § 200.71 (1983).

several restrictions designed to insulate the Title I program from private school influence and to assure religious neutrality in the provision of Title I services to private school students. *See* S. Rep. No. 146, *supra*, at pp. 36-37. The LEA must, for example, keep title to and exercise administrative control over all equipment and supplies acquired with Title I funds. 34 C.F.R. § 200.74(a) (1983). Only public employees or outside contractors who are "independent of the private school and of any religious organizations" may provide services to private school children. *Id.* § 200.70(d)(1) (1983). No Title I funds may be used to meet "[t]he needs of the private schools" or "[t]he general needs of the children in the private schools." *Id.* § 200.72(b) (1983). Educational services may be provided on the premises of a private school [6] only "[t]o the extent necessary to provide equitable services" and only if these services "are not normally provided by the private school." *Id.* § 200.73 (1983). *See also* S. Rep. No. 146, *supra*, at p. 12. If the LEA chooses to provide Title I services on private school premises, it must "ensure that the equipment or supplies placed [there] . . . are used for [Title I] purposes." 34 C.F.R. § 200.74(c)(1) (1983).

B. New York City's Title I Program

The Title I program administered by the New York City Board of Education ("Board") is the largest in the nation. The pertinent facts concerning its organization and operation were set forth below in the Defendants' Joint Statement of Material Facts Not in Dispute (JA 26-73) and were essentially uncontested. (S.G. App. 10a, 56a n.1).

The Board distributes funds among statutorily eligible public and private school children according to a simple *per capita* formula. (S.G. App. 7a). For example, in the

---

[6] In *Wheeler* v. *Barrera*, *supra*, this Court held that Congress anticipated that "one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction . . . ." 417 U.S. at 422 (footnote omitted).

1981-1982 school year,[7] 13.2 percent, or 40,120, of the eligible children in New York City attended private schools, and 13.5 percent, or $20 million, of the total New York City Title I allocation went to services for private school students. (JA 37-38). Budgetary and logistical constraints made it possible to provide Title I remedial services only to approximately 21,000 of the 40,120 eligible private school students during the 1981-1982 school year. These students attended 231 of the 993 private schools in New York City. (JA 38).

In accordance with Title I and its implementing regulations, no public funds are disbursed to private schools under the New York City program. Instead, the Board, using its own personnel and equipment, provides remedial services on private school premises to private school children who satisfy the statutory eligibility criteria. (JA 44). The services are remedial reading programs, reading skills centers, remedial mathematics programs, instruction in English as a second language, and clinical and guidance programs.[8] (*Id.*) These services do not supplant or duplicate services provided by the private schools;[9] they are strictly supplemental.[10] (JA 44-45).

---

[7] At the time that defendants submitted their motions for summary judgment and supporting evidence, the 1981-1982 school year was the most current year for which data were available.

[8] The clinical and guidance program is available only to students enrolled in one of the four Title I instructional programs. It is designed to enhance student achievement in those programs through diagnosis and treatment by guidance counselors, psychologists, social workers, and psychiatrists. (JA 45-46).

[9] Prior to the commencement of the Title I private school program, New York City Catholic schools did not provide any of the remedial services now available under Title I. If these Title I services were for any reason withdrawn, these schools could not provide them on their own. (JA 253, 271-72).

[10] From the program's inception the Board has scrupulously complied with the statutory requirement, *see* 20 U.S.C. § 3807(b) (1982), that Title I services supplement, not supplant or duplicate, services already provided by the private schools. (JA 44-45). For example, in a 1966 resolution, the Board decided against providing

1. *Reasons for an On-Premises Program*

New York City experimented unsuccessfully with alternative methods of providing Title I services to private school children before adopting the on-premises program at issue in this case. Initially, the Board attempted to provide the services after regular school hours—first, on public school premises and, later, on private school premises. Both of these after-hours experiments failed. Attendance was poor. Students were unreceptive. Teachers were tired. Parents were concerned about the safety of their children traveling home after dark or in inclement weather. Communication between the Title I teacher and the regular classroom teachers, which is vital in remedial education, was all but impossible. (JA 63-64).

Faced with these problems,[11] the Board concluded in August 1966 that the only practical method of meeting its obligation to provide private school children with equitable Title I services was to send Title I teachers into the private schools during regular school hours.[12] (JA 64-66). That method of providing Title I services has continued to the present time.[13]

---

speech improvement instruction (as distinguished from therapy for stammering and other speech impediments) because it was "too close to regular class-room work." (Def. Exh. L at p. 3).

[11] An investigation team of the Office of Education of the United States Department of Health, Education, and Welfare found similar problems in 1976 in an after-hours Title I program in Missouri. (JA 34-37).

[12] The Board believed that the "shared time" option—providing Title I instruction to private school students at public schools during regular school hours—was foreclosed by Art. XI, § 3 of the New York State Constitution. (JA 64).

[13] The Board has continued to examine the option of off-premises Title I instruction for private school students. A study conducted by City school officials in the 1977-1978 school year concluded that if Title I services were provided to private school children at public schools, more than 40 percent, or $4.2 million, of the total budget for the private school Title I program would have to be diverted to such non-instructional costs as transportation, security, and building maintenance. It was anticipated that such a diversion

2. Title I Teachers

The teachers and other professionals who provide Title I services to private school children are regular salaried employees of the New York City Board of Education and are subject exclusively to the Board's control and supervision. (JA 46-47). Their assignment to the private school Title I program, their assignment to a particular private school or schools, and their reassignment, transfer, discipline, and discharge are matters exclusively within the province of the Office of Special Projects (formerly, the Bureau of Nonpublic School Reimbursable Services) that operates the private school Title I program. (JA 48-49). Religious affiliations play no role whatsoever in such decisions. (JA 48).[14]

The amount of time that a particular Title I teacher or other professional spends at any one private school depends on the number of students eligible for Title I services at the school and the educational needs of those students. During the 1981-1982 school year, approximately 78 percent of Title I teachers and professionals were itinerant in that they spent fewer than five days a week in the same private school and worked in more than one. All social workers, psychologists, and psychiatrists in the program are itinerant. (JA 49).

Every teacher and professional in the private school Title I program is given detailed written and oral in-

---

of funds would require the elimination of 167 teaching positions in the private school Title I program and the elimination of instructional services to 36 percent, or 5,000, of the private school students who participated in the Title I program during the 1977-1978 school year. (JA 66-68).

[14] Indeed, the Board makes no inquiry and maintains no record of the religious affiliations of teachers interviewed for or assigned to the private school program. (JA 48). However, the affidavits of Title I private school teachers, who were chosen at random as to religion, Def. Exh. U. (Tab A-4, ¶ 72), demonstrate that nearly three-quarters are of a religious faith different from the affiliation of the private school to which they are assigned, and that more than 90 percent are of a faith different from at least one of the private schools to which they are assigned. (JA 49-50).

structions upon initial assignment and at regular in-service training sessions thereafter. (JA 50). The teachers are instructed, among other things, that (1) they are employees of the Board and are accountable only to their public school supervisors, not to any private school officials; (2) they have sole responsibility for selecting students for the Title I program and may teach only children who meet the eligibility criteria for Title I aid; (3) they must make certain that their materials and equipment are used only in the Title I program; (4) they may not engage in team-teaching or other cooperative instructional activities with private school teachers;[15] and (5) they may not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. (JA 50-51). Appellees presented no evidence whatsoever that any of the guidelines have been violated since the inception of the on-premises program in 1966.

Teachers in the Title I private school program are subject to the direct and exclusive supervision of public school field supervisors, who make unannounced visits to their classrooms on a monthly basis to evaluate their performance, discuss problems, and ensure compliance with program guidelines. (JA 53). Program coordinators, who report directly to the Director of the Office of Special Projects, oversee the activities of the field supervisors and make occasional unannounced visits to Title I classrooms. They also conduct regular in-service training sessions for Title I teachers at which program guidelines are often reinforced. (JA 54). No report from any source—including independent professional

---

[15] A remedial program can be effective only if the remedial teacher consults with the regular classroom teacher to determine the student's particular needs and to check his classroom progress in the subject in which he is receiving remediation. While Title I teachers are told such consultations are permissible, they are instructed to confine them to mutual professional concerns about their students' educational needs and not to discuss any matters of a religious nature. (JA 51-52).

evaluators, who also visit Title I classrooms from time to time—has ever found any religious content in Title I instruction or any Title I teacher engaging in any religious activity while at a private school. (JA 55).

3. *Title I Classrooms, Equipment, and Materials*

Before Title I teachers and other professionals are assigned to a private school, program coordinators inform the principal of applicable federal, state, and local guidelines, including the requirement that rooms used for Title I instruction or support services be entirely free of religious objects or symbols. Private schools ordinarily set aside a separate classroom for the exclusive use of Title I teachers, and support professionals customarily use the nurse's room or comparable facility. The private schools are not reimbursed for any cost they incur in providing classroom space for Title I instruction. Def. Exh. U. (Tab A-4, ¶ 99). There is no evidence in the record of this case that Title I services have ever been provided in any private school room containing a religious symbol, painting, statue, or artifact. (JA 58-59).

Teaching materials and equipment used in the private school Title I program are selected by public school employees. The teaching materials cannot duplicate materials used in regular classroom instruction and can have no religious content. All equipment and materials are labeled as property of the Board, are locked in storage and filing cabinets when not in use, and are subject to annual inventory. Title I teachers are instructed that they are not to allow Title I property to be borrowed or otherwise diverted for private school use. (JA 56-57).

4. *Private Schools Attended by Title I Students*

The great majority of private school students who receive Title I services in New York City attend religiously affiliated schools: 85 percent attend Roman Catholic schools and 8 percent attend Hebrew Day schools. (JA 71). These church-affiliated schools, however, dif-

fer in several significant respects from the "profile" of "pervasively sectarian schools" developed by this Court in earlier educational aid cases. For example, they do not restrict the hiring of teachers or the admission of students on religious grounds.[16] They make no attempt to compel their students to obey the doctrine and dogma of the sponsoring church. They place no religious limitations on the content of the instruction offered and require secular subjects to be taught according to their own internal disciplines. (JA 71-72).

The record also demonstrates that the public employees who administer and staff the Title I program in New York City private schools do not perceive a dominant sectarian mission or pervasive religious atmosphere in those schools. Nor have these employees been subject to any religious pressures from the private schools. Def. Exh. U. (Tabs A-5 to A-46).

5. *Contacts Between Title I Administrators and Private School Officials*

Contacts between Title I administrators and private school officials are routine in character and limited to three general categories—dissemination by Title I administrators of basic information about the program (JA 59-60), submission by the private school principals for review by Board officials of standard form requests for Title I services (JA 60-61), and responses by Title I administrators to routine inquiries from private school officials about scheduling and like matters. (JA 61). There is no evidence in the record to show or suggest that these administrative contacts have involved Title I

---

[16] Many of the New York City Catholic schools that have Title I programs are located in inner-city neighborhoods with large minority populations and have significant numbers of non-Catholic students. (JA 262). Indeed, several Title I Catholic schools serving predominantly black and Asiatic populations in New York City have student populations that are more than 60 percent non-Catholic. (*Ibid.*)

administrators in the curricula or internal operations of the private schools in which Title I services are made available, or that private school officials have exercised, or attempted to exercise, any control at all over the Title I program.

C. The Proceedings Below

On August 11, 1978, appellees, six federal taxpayers claiming standing as such, filed this action in the United States District Court for the Eastern District of New York, alleging that New York City's on-premises Title I private school program violated the Establishment Clause of the First Amendment. The district court initially stayed the proceedings pending a final determination of *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) (hereinafter "*PEARL*"), a virtually identical Establishment Clause challenge to New York City's Title I program for private school students.

After the three-judge district court in *PEARL* held unanimously that New York City's Title I program was constitutional [17] and this Court dismissed the appeal from that decision for want of jurisdiction, 449 U.S. 808 (1980), appellees renewed their constitutional challenge. These appellants, whose children received Title I remedial services at their church-affiliated schools, intervened as defendants to protect their children's interest in the continuation of the Title I program. The parties, having stipulated that the case should be decided on the evidentiary record developed in *PEARL*, along with two affidavits updating that record, filed cross-motions for summary judgment. The district court, placing substantial reliance on the analysis of the three-judge dis-

---

[17] The opinion of the three-judge district court in *PEARL* is set forth as Appendix C to the Solicitor General's Jurisdictional Statement.

trict court in *PEARL*, granted defendants' motions for summary judgment and dismissed the complaint. (S.G. App. 55a-59a).

On appeal, the United States Court of Appeals for the Second Circuit reversed. The court of appeals had "no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion." (S.G. App. 4a). It had no quarrel with a 1971 Office of Education report stating that "Title I creates the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." (*Id.* at 14a). It acknowledged that "the City could reasonably have regarded [the on-premises program] as the most effective way to carry out the purposes of the Act" (*id.* at 4a) and conceded that alternative methods of providing Title I services to private school children "are almost certain to be less effective, more costly, or both" (*id.* at 52a). And it professed "fully [to] understand and appreciate why the three-judge court in *PEARL* and the district judge here struggled to find constitutional justification for *a program that apparently has done so much good and little, if any, detectable harm.*" (*Ibid.*) (Emphasis added).

Nevertheless, the court of appeals, relying principally on *Meek* v. *Pittenger*, 421 U.S. 349 (1975), held that the Establishment Clause "constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry out instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here." (S.G. App. 4a). The court read *Meek* as establishing a *per se* rule, prohibiting public school teachers from offering remedial instruction of any kind and under any

circumstances on the premises of church-affiliated schools. (S.G. App. 35a-36a). The court thus declined even to consider the contention that the record in this case demonstrates that none of the dangers or "potentials" that concerned this Court in *Meek* has in fact materialized in New York City's Title I program and that New York City's Title I teachers have taught for 18 years in church-affiliated schools without advancing religion or excessively entangling church and state.

SUMMARY OF ARGUMENT

I.

A. This Court's recent Establishment Clause cases have rejected "absolutist approaches," *Committee for Public Education* v. *Regan*, 444 U.S. 646, 662 (1980), and "fixed, *per se* rule[s]," *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1361 (1984), as inadequate to the resolution of modern church-state problems. A central teaching of these cases is that Establishment Clause analysis must concern itself with realistic and appreciable dangers, not remote or hypothetical ones. A statute does not offend the Establishment Clause if time and experience have proved that it does not in fact constitute "a step toward establishment" or create any of the substantive evils against which that Clause is designed to protect.

The court of appeals disregarded this teaching. The extensive and uncontested evidentiary record in this case demonstrated that New York City has succeeded for the past 18 years in providing Title I remedial instruction on the premises of church schools without impairing any of the values protected by the Establishment Clause. In ignoring that record—and relying instead on *a priori* suppositions and a *per se* rule—the court of appeals failed in its constitutional responsibility to "distinguish between real threat and mere shadow." *Marsh* v. *Chambers*, 103 S. Ct. 3330, 3337 (1983).

B. Title I is fully consistent with the basic principle of neutrality that underlies the Establishment Clause since it provides identical benefits to all needy children, wherever they happen to attend school. For Congress to have excluded otherwise eligible religious school children would have manifested hostility, not neutrality, toward religion.

In providing private school children with Title I services on the premises of their own schools, New York City has not favored religion, but only declined to penalize those children for educational choices made for them by their parents. If, as this Court has held, a public school system can accommodate the "spiritual needs" of public school children, *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952), then New York City can accommodate the secular educational needs of religious school children.

II.

Title I satisfies the three-part test that this Court has looked to for guidance in deciding Establishment Clause cases.

A. Title I has an undisputed secular purpose: to improve the education of disadvantaged children.

B. Title I does not have a primary effect that advances or inhibits religion. First, Title I aid is provided directly to eligible students, not to the schools they attend. Second, church school children constitute only a small part of the class of students who benefit from Title I services. Third, Title I aid is restricted solely to secular activities and is not diverted for religious purposes or subject to religious influence.

C. New York City's Title I program also avoids excessive administrative entanglement between government and religion. There is, for several reasons, no need for the kind of continuing and intrusive surveillance thought

necessary in prior cases to prevent impermissible fostering of religion. First, the schools involved in this case are not "pervasively sectarian." Second, Title I services are provided directly to eligible private school children by public employees under public supervision, and no Title I funds are disbursed to the schools themselves or their teachers. Third, New York City has not relied entirely on the good faith and professionalism of Title I teachers but rather has carefully structured the Title I program to insulate it from private school influence and assure its complete autonomy.

The record in this case discloses two basic types of administrative relationships arising out of New York City's program: (1) supervision of Title I teachers and professionals by Title I and other public administrators, and (2) routine administrative contacts between Title I and private school personnel. The first relationship is exclusively between public employees, not between government and any religious authority. The second is between government and religious authorities, but it involves neither supervision nor surveillance and does not amount to *excessive* government entanglement with religion.

Finally, there is no basis for a finding that Title I fosters excessive political entanglement. Since Title I does not provide a direct subsidy to church schools, there is no need even to consider the question of political entanglement. In any event, Title I has no potential for divisive conflict over aid to religion, and has created no such conflict since its enactment in 1965.

ARGUMENT

I. GOVERNING CONSTITUTIONAL PRINCIPLES

A. "No Fixed, *Per Se* Rules"

This Court has repeatedly cautioned against a rigid, absolutist view of the Establishment Clause. Last Term, in *Lynch* v. *Donnelly*, *supra*, the Court pointedly noted that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." 104 S. Ct. at 1361. Because the Establishment Clause "is not a precise, detailed provision in a legal code capable of ready application," the "line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test." *Id.* at 1362. Thus, "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." *Id.* at 1361.

These admonitions against absolutism and *per se* rules are not new to the Court's Establishment Clause cases. In *Committee for Public Education* v. *Regan*, *supra*, 444 U.S. at 662, the Court observed that "[w]hat is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes." In *Walz* v. *Tax Commission*, the Court emphasized that the Framers' purpose was "to state an objective, not to write a statute," and noted that earlier decisions had refused to construe the Establishment Clause "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." 397 U.S. 664, 668-71 (1970). In *McCollum* v. *Board of Education*, where the Court addressed the constitutionality of a "released time" program in the schools of Champaign, Illinois, Justice Frankfurter, writing for three of his brethren, explained that " 'released time' as a generalized conception, undefined by differentiating

particularities, is not an issue for Constitutional adjudication":

> "The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. *How does 'released time' operate in Champaign?*" 333 U.S. 203, 225-26 (1948) (separate opinion) (emphasis supplied).[18]

And, most important for present purposes, this Court expressly acknowledged in *Wheeler* v. *Barrera*, *supra*, that "the range of possibilities" for on-premises Title I instruction is "a broad one" and cautioned that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." 417 U.S. at 426.

Foremost among the reasons for these recurring admonitions is the Court's recognition that no metaphor, however illustrious its pedigree and familiar its language,[19] and no verbal formula, however neat or elegant, can resolve the delicate and manifold problems of church-state relations in a complex, modern society.

---

[18] As appellants will argue more fully below, the controlling question in this case should be that framed by Justice Frankfurter: How does the Title I on-premises program operate in New York City? The court of appeals failed to address this question because it erroneously believed "on-premises instruction" to be unconstitutional under any and all circumstances.

[19] Last Term this Court observed: "The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Lynch* v. *Donnelly*, *supra*, 104 S. Ct. at 1359. *See also Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971).

Thus, for example, while this Court has said that one of the purposes of the Establishment Clause is to "separate" church from state, it has also stressed time and again that "total" or "complete" separation is neither possible nor required.[20] *See, e.g., Lynch* v. *Donnelly, supra*, 104 S. Ct. at 1359; *Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-46 (1976); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 760 (1973); *Lemon* v. *Kurtzman, supra*, 403 U.S. at 614. The Establishment Clause "does not say that in every and all respects there shall be a separation of Church and State." *Zorach* v. *Clauson, supra*, 343 U.S. at 312. "The problem, like many problems in constitutional law, is one of degree." *Id.* at 314. *See also Lynch* v. *Donnelly, supra*, 104 S. Ct. at 1358-59.

Moreover, the Court has come increasingly to recognize that absolutist approaches and *per se* rules are at odds with the historic purposes of the Establishment Clause and the modern societal values that Clause serves to protect. The specific historical purpose of the Establishment Clause, as the Court recently noted, was to prevent a national ecclesiastical establishment or state

---

[20] "[T]he complexities of modern life inevitably produce some contact" between government and religious institutions. *Walz* v. *Tax Commission, supra*, 397 U.S. at 676. *See also Lynch* v. *Donnelly, supra*, 104 S. Ct. at 1359. The necessary contacts are many and varied. For example, church-related schools are required to satisfy state standards for curriculum and quality. *See Board of Education* v. *Allen*, 392 U.S. 236, 245-46 (1968). Church-sponsored hospitals and nursing homes must comply with government health and safety standards. The government provides religiously affiliated institutions with services, such as fire and police protection, sewage disposal, and public streets and highways, which are available to the public generally. *Everson* v. *Board of Education*, 330 U.S. 1, 17-18 (1947). In some instances, government has chosen to work through private institutions, including those with religious affiliations, to achieve its social welfare goals. *See Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (upholding federal aid to hospitals operated by a religious order).

religion. *Lynch* v. *Donnelly*, *supra*, 104 S. Ct. at 1361. Whether this purpose is defeated in a particular case cannot be determined by reference to some *per se* rule, but only by careful scrutiny of the challenged law or practice in light of all the circumstances "to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so." *Id.* (emphasis supplied). *See also Marsh* v. *Chambers*, *supra*, 103 S. Ct. at 3336; *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678.

Similarly, the more general values protected by the Establishment Clause—liberty of religious belief and conscience, the autonomy and integrity of religious organizations, civic harmony and peace[21]—cannot be secured by mechanical application of a body of "fixed, *per se* rules." The reason is that "accommodations" among these values are "unavoidable," *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 305-06 (Goldberg, J., concurring), competing concerns like "fairness" and "regulatory efficiency" must often be considered, *see* Giannella, *supra* n.21, at 517-20, and due deference must be paid to our traditional practices and our heritage as a religious people, *see Lynch* v. *Donnelly*, *supra*; *Marsh* v. *Chambers*, *supra*; *Zorach* v. *Clauson*, *supra*.

Finally, "fixed *per se* rules" are directly at odds with the nondoctrinaire realism of this Court's most recent Establishment Clause decisions. In these cases, the Court has realistically assessed the dangers posed by the challenged statute or practice and has discounted hypothetical and speculative concerns. *See Lynch* v. *Donnelly*, *supra* (approving public sponsorship of nativity scene at Christmas); *Marsh* v. *Chambers*, *supra* (approving use

---

[21] *See, e.g., Walz* v. *Tax Commission*, *supra*, 397 U.S. at 694 (opinion of Harlan, J.); *Abington School District* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). *See generally* Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513 (1968).

of tax funds to pay legislative chaplain); *Mueller* v. *Allen*, 103 S. Ct. 3062 (1983) (approving tax deductions for portion of church school tuition); *Committee for Public Education* v. *Regan*, *supra* (approving reimbursement of church schools for testing and reporting services mandated by state law). In *Marsh* v. *Chambers*, *supra*, the Court emphasized in the clearest terms that Establishment Clause analysis must concern itself with realistic and appreciable dangers, not remote and speculative ones:

> "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." 103 S. Ct. at 3337, *quoting Abington School District* v. *Schempp*, *supra*, 374 U.S. at 308 (Goldberg, J., concurring).[22]

And in *Mueller* v. *Allen*, *supra*, the Court emphasized that "[a]t this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights":

> "The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court." 103 S. Ct. at 3069, *quoting Wolman* v. *Walter*, 433 U.S. 229, 263 (1977) (opinion of Powell, J.).

---

[22] The immediately preceding sentence in Justice Goldberg's opinion is also worth noting: "The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact." 374 U.S. at 308.

See also Lynch v. *Donnelly, supra*, 104 S. Ct. at 1365 ("the 'fears and political problems' that gave rise to the Religion Clauses in the 18th century are of far less concern today").

This refusal to rely upon hypothetical and speculative concerns has firm roots in the Court's Establishment Clause jurisprudence. In *Tilton* v. *Richardson*, for example, the Court warned against reliance on mere "possibilities" that find no support in the record:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." 403 U.S. 672, 679 (1971) (plurality opinion).

See also Walz v. *Tax Commission, supra*, 397 U.S. at 678.

The teaching of these cases is that courts should not invalidate statutes or practices that time and experience [23] have proved do not, *as a practical matter*, create any of the consequences that the Framers feared or that the

---

[23] A program or practice that has been in existence for some time, whether long enough to amount to a "tradition" or not, is less vulnerable to Establishment Clause challenge than is a new and innovative one. This is so, among other reasons, because the Court need not rely on an assessment of mere "potentials," but instead can see for itself whether any of the substantive evils against which the Establishment Clause protects have *in fact* materialized. For example, the Court can look to see whether the program has in fact generated demands for more governmental action along the same lines. If it has not done so, arguments that it is "the foot in the door" or "the first step toward 'establishment' " will have no force. *See Walz* v. *Tax Commission, supra*, 397 U.S. at 678. Likewise, if the program's history has been calm, generalized concerns about administrative entanglement and political divisiveness will miss the mark.

Establishment Clause is now expected to prevent. *See Lynch* v. *Donnelly*, *supra*, 104 S. Ct. at 1361. Not every box, after all, is Pandora's, and a statute or practice that can be clearly seen not to constitute "a step toward establishment" [24] and not realistically to threaten unwelcome consequences for religious liberty or civic peace should not be disturbed.

The court of appeals failed to heed these teachings. It entirely disregarded the extensive and uncontested record of how the New York City on-premises Title I program has operated since its inception in 1966, and rested its decision instead on generalized *a priori* assessments of "risks" and "potentials" and a mechanical application of a *per se* rule. The record in this case discloses, however, that none of the potential problems that concerned this Court in *Meek* has materialized in the New York City program.[25] In ignoring that record, the court

---

[24] The court of appeals in this case expressed concern that, if the remedial instruction offered at church-affiliated schools under Title I survived constitutional scrutiny, government might be encouraged to offer a broad range of instructional programs at these schools. (S.G. App. 41a-43a). However, nothing in the record of this case, or for that matter in the United States Code, shows any significant expansion of federal educational programs since the enactment of the Elementary and Secondary Education Act in 1965. If Title I is "the first step toward 'establishment' of religion . . . , the second step has been long in coming." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678.

[25] The auxiliary services program struck down in *Meek* was challenged soon after its enactment, and the case reached this Court with a very meager record of how the program operated. Under those circumstances, the Court rested its decision on generalized assessments about the problems that might arise. The *Meek* Court, however, did not state or suggest that reliance on *a priori* assessments was the *preferred* means of constitutional adjudication or that such assessments are in effect *irrebuttable* presumptions.

The court of appeals' disregard of the extensive and uncontested evidentiary record in this case, moreover, conflicts with this Court's decision in *Wheeler* v. *Barrera*, *supra*. There the Court rejected

of appeals failed in its constitutional responsibility to "distinguish between real threat and mere shadow." *Marsh* v. *Chambers*, *supra*, 103 S. Ct. at 3337.

B. Neutrality and Accommodation

The fundamental principle underlying the Establishment Clause is that government must be neutral toward religious institutions and activities. "Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity." *Roemer* v. *Board of Public Works*, *supra*, 426 U.S. at 747. *See also Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 788. In view of the necessary and inevitable contacts between church and state in modern society, *see Walz* v. *Tax Commission*, *supra*, 397 U.S. at 676, the principle of neutrality ensures a course of governmental conduct that neither advances nor inhibits religion.[26]

The "neutrality" demanded by the Establishment Clause precludes government from being "hostile" to religious groups and religious activity. *Zorach* v. *Clauson*, *supra*,

---

an invitation to rule on the constitutionality of on-premises Title I instruction because no concrete program was before it and "the First Amendment implications may vary according to the precise contours of the plan that is formulated." 417 U.S. at 426. For the sake of illustration, the Court contrasted two kinds of on-premises programs that "would undoubtedly" present different constitutional questions. *Id.* Clearly, the Court was inviting parties litigating the constitutionality of on-premises Title I instruction to develop an evidentiary record. The defendants in the trial court in this case did exactly as *Wheeler* suggested, only to have the court of appeals totally disregard that record by deciding the case on a *per se* rule.

[26] A corollary of the neutrality principle is that not every law that in some manner "aids" a religious institution violates the Establishment Clause. *Mueller* v. *Allen*, *supra*, 103 S. Ct. at 3065-66. Religious institutions and those who attend them "need not be quarantined from public benefits that are neutrally available to all." *Roemer* v. *Board of Public Works*, *supra*, 426 U.S. at 746.

343 U.S. at 314. *See Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1359. In *Walz* v. *Tax Commission, supra,* the Court explained:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." 397 U.S. at 669 (emphasis supplied).

Far from barring every friendly gesture between church and state, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any . . . . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1359.[27] Indeed, government may act to some extent to accommodate or facilitate the practice of religion, even when it is not compelled to do so by the Free Exercise Clause, *see id.* at 1359-61; *id.* at 1381 (Brennan, J., dissenting), as long as it does not coerce dissenters and nonbelievers or give preference to one religious group over another. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our

---

[27] *See also McDaniel* v. *Paty,* 435 U.S. 618, 638 (1978) (Brennan, J., concurring) (Establishment Clause decisions "must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause"); *Abington School District* v. *Schempp, supra,* 374 U.S. at 305-06 (Goldberg, J., concurring).

people and accommodates the public service to their spiritual needs." *Zorach* v. *Clauson*, *supra*, 343 U.S. at 313-14. *See also Lynch* v. *Donnelly*, *supra*, 104 S. Ct. at 1361.

Title I adheres strictly to the basic principle of neutrality. The federal government, which does not maintain a school system of its own, has extended remedial educational benefits on an equal basis to all needy school children, wherever they happen to attend school.[28] *See* 20 U.S.C. § 3806 (1982); 34 C.F.R. § 200.71 (1983). For Congress to have excluded otherwise eligible children because they attend church schools would have manifested "patent hostility toward, not neutrality respecting, religion." *McDaniel* v. *Paty*, *supra*, 435 U.S. at 636 (Brennan, J., concurring). *See Everson* v. *Board of Education*, *supra*, 330 U.S. at 18; *Zorach* v. *Clauson*, *supra*, 343 U.S. at 313-14. *Cf. Americans United for the Separation of Church and State* v. *Blanton*, 433 F. Supp. 97 (M.D. Tenn.) (three-judge district court), *summarily aff'd*, 434

---

[28] A *federal* program such as Title I differs in an important respect from a *state* program providing aid to private schools. In *Nyquist*, *supra*, the Court noted that state grants "to parents of private school children are given in addition to the right that they have to send their children to public schools 'totally at state expense.'" 413 U.S. at 782 n.38. Whatever vitality this reasoning may retain after *Mueller* v. *Allen*, *supra*, it has no application to a program of federal aid, such as that provided by Title I. The federal government, unlike the states, does not maintain a school system, and the benefits it provides private school students under Title I are not provided "in addition to" any right it provides those students to attend schools "totally at [federal] expense." For the federal government to extend its assistance to all needy children on an equitable basis, it must include children attending private schools as well as children attending state-sponsored public schools. The Court implicitly accepted this conclusion in *Wheeler* v. *Barrera*, *supra*, when it stated that "since the legislative aim [of Title I] was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act." 417 U.S. at 406 (emphasis in original).

U.S. 803 (1977) (upholding statute that provided scholarships to needy students attending either public or private colleges).

New York City has implemented Title I with like neutrality. It has allocated funds among public and private school children according to a *per capita* formula.[29] *See* 34 C.F.R. § 200.71(a) (1983). It moved its private school Title I program on premises only after off-premises experiments had failed. *See* p. 7, *supra*. By providing private school children with Title I services on the premises of their own schools, where the services can alone be comparable to those enjoyed by public school children, *see* 34 C.F.R. § 200.71(b) (1983), New York City has not favored religion or religious schools. It has merely declined to *penalize* religious school students for constitutionally protected educational choices made for them by their parents.[30] Whether or not the Free Exercise Clause *prohibits* such a penalty, *cf. Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Establishment Clause most certainly does not *require* it. If, as this Court has held, a public school system can accommodate the "spiritual needs" of public school children, *Zorach* v. *Clauson*, *supra*, 343 U.S. at 314, then surely it can accommodate the purely secular *educational* needs of religious school children. That is all New York City has done here.

II. THE THREE-PART TEST

Title I is not only consistent with the fundamental values underlying the Establishment Clause; it also satisfies the three-part test that this Court has used to identify instances in which the objectives of the Establishment Clause have been impaired.

---

[29] During the 1981-1982 school year, for example, approximately 13 percent of the children eligible for Title I services in New York City attended private schools, and approximately 13 percent of New York City's Title I allocation was budgeted for services to private school students. (JA 37-38).

[30] A religious school student who travels to an off-premises site at the end of a regular school day loses the full benefit of Title I remedial services. (JA 64).

The Court has stated the three-part test as follows:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Mueller* v. *Allen*, *supra*, 103 S. Ct. at 3066, *quoting Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-13.

Although the Court has repeatedly stressed its "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch* v. *Donnelly*, *supra*, 104 S. Ct. at 1362,[31] the Court has not struck down any statute that satisfied all three parts of the test.

A. Purpose

There can be no question that Title I has a secular legislative purpose. The opening section of the Title provides:

> "In recognition of the special educational needs of children of low-income families . . . the Congress hereby declares it to be the policy of the United States to provide financial assistance . . . to local educational agencies . . . to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 2701 (1982). *See also* 20 U.S.C. § 3801 (1982).

Moreover, as the *PEARL* court concluded, "[t]he legislative history of Title I clearly demonstrates that the purpose of the statute was to give aid to needy children regardless of where they attend school." (S.G. App. 76a).[32] Both the language of the statute and the legis-

---

[31] In *Marsh* v. *Chambers*, *supra*, the Court declined to apply the three-part test in circumstances where the test could not have been satisfied. *See* 103 S. Ct. at 3338 (Brennan, J., dissenting).

[32] In enacting Title I, Congress adopted the statement of purpose of President Johnson: "This bill has a simple purpose: To improve the education of young Americans." S. Rep. No. 146, *supra*, at p. 3.

lative history, as appellees have conceded, demonstrate that Title I's purposes are unequivocally and wholly secular.[33]

B. Primary Effect

The court of appeals expressly declined to decide whether the Title I program satisfies this test. (S.G. App. 38a). The record evidence establishes, however, that Title I does not have a "primary effect" that either advances or inhibits religion. First, Title I aid is provided directly to eligible students, not to the schools they attend. Second, church school children constitute only a small part of the class of students who benefit from Title I services. Third, Title I aid is restricted solely to secular activities and is not diverted for religious purposes or subject to religious influence.

1. *Direct Aid to Students*

As a threshold matter, Title I presumptively satisfies the primary effect element of the three-part test because the statute provides aid directly to students, not to

---

[33] The purpose of including church school children in the statute's benefits was not, even in part, to lighten the financial burden of their parents or their schools, but *solely* to assist them in overcoming the educationally disadvantaging effects of their families' poverty. As Msgr. William McManus, then Superintendent of Catholic Schools in Chicago, testified at hearings on Title I:

> "The measure pending before this Committee, let us face it, is not going to take any financial burden off the backs of the benefactors and patrons of non-public schools. It will do no more than give some of the children, particularly the poorest of poor children attending them, an opportunity for an enriched education." *Hearings on Aid to Elementary and Secondary Education Before the General Subcommittee on Education of the House Committee on Education and Labor*, 89th Cong., 1st Sess. 841 (1965).

In marked contrast, the auxiliary services program invalidated in *Meek* v. *Pittenger*, *supra*, was part of a general effort on the part of Pennsylvania, *see also Lemon* v. *Kurtzman*, *supra*; *Sloan* v. *Lemon*, 413 U.S. 825, 832 (1973), to assure the continued financial health of church schools.

schools.[34] *See Mueller* v. *Allen*, *supra*, 103 S. Ct. at 3069. *See also Everson* v. *Board of Education*, *supra*, 330 U.S. at 17-18 (bus fare reimbursement program upheld); *Board of Education* v. *Allen*, *supra*, 392 U.S. at 243-44 (textbook loan program upheld); *Wolman* v. *Walter*, *supra*, 433 U.S. at 238 (same); *Meek* v. *Pittenger*, *supra*, 421 U.S. at 362 (same); *Americans United for the Separation of Church and State* v. *Blanton*, *supra*, 433 F. Supp. at 104 (upholding statute authorizing financial assistance to needy students in both public and private colleges, including pervasively sectarian ones, on the ground that "the emphasis . . . [was] on the student rather than the institution").

"Title I clearly adheres to the child benefit principle established in *Everson* and *Allen*." *PEARL*, *supra* (S.G. App. 80a). As this Court has recognized, "the legislative aim [of Title I] was to provide needed assistance to educationally deprived *children* rather than to specific schools." *Wheeler* v. *Barrera*, *supra*, 417 U.S. at 406 (emphasis in original). *See also id.* at 424; 111 Cong. Rec. 5567 (1965) (remarks of Rep. Perkins, manager of the House Bill). Like the bus service provided in *Everson* and the textbooks loaned in *Allen*, the remedial services provided under Title I go directly to students.[35] Moreover, aid is provided to eligible private

---

[34] In *Mueller* v. *Allen*, *supra*, the Court noted that all but one of its recent decisions invalidating state aid to parochial schools "have involved the direct transmission of assistance from the state to the schools themselves." 103 S. Ct. at 3069. The lone exception is *Committee for Public Education* v. *Nyquist*, *supra*, where, as *Mueller* explained, 103 S. Ct. at 3068, a tuition grant program was invalidated because the only beneficiaries were parents of children in private schools.

[35] Decisions striking down direct aid to religious institutions therefore have no application here. Those decisions are based on the presumption that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to *an institution* in which religion is so pervasive that a substantial portion

school children on the premises of their schools during regular school hours, not to benefit the schools, but only to ensure that the children receive services that are equitable "in relation to the services provided to public school children." 34 C.F.R. § 200.71(b) (1983).

2. *Broad Class of Beneficiaries*

A program providing aid directly to religious school children might still have a primary effect of advancing religion if public school children were ineligible for the aid. In *Nyquist*, *supra*, the Court struck down a state scheme that provided financial benefits *exclusively* to parents who paid tuition to send their children to private schools. *See* 413 U.S. at 780-94. The Court distinguished the bus fare reimbursement program upheld in *Everson*, *supra*, and the textbook loan program upheld in *Board of Education* v. *Allen*, *supra*, on the ground that "[i]n both cases the class of beneficiaries included *all* school children, those in public as well as those in private schools." 413 U.S. at 782 n.38 (emphasis in original).

More recently, in *Mueller* v. *Allen*, *supra*, the Court sustained a state statute that permitted "*all* parents—whether their children attend public school or private—to deduct their children's educational expenses" in computing their taxes. 103 S. Ct. at 3069 (emphasis in original). The Court explained that "the provision of benefits to so broad a spectrum of groups is an important index of secular effect," *id.* at 3068,[36] and distinguished

---

of its functions are subsumed in the religious mission . . . ." *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973) (emphasis added). This presumption does not apply to aid provided directly to students.

[36] When identical benefits are provided to a broad class of beneficiaries, no "imprimatur of State approval" is conferred on those members of the recipient class who happen to have a religious affiliation. *Mueller* v. *Allen*, *supra*, 103 S. Ct. at 3068. The court of appeals' concern that on-premises instruction might provide church schools with a symbolic benefit in the nature of endorsement (S.G. App. 43a-44a) is thus farfetched indeed.

Nyquist on the ground that the only beneficiaries of the statute there were the parents of private school children.

This case is clearly controlled by *Everson*, *Allen*, and *Mueller*, not by *Nyquist*. Like the schemes upheld in those three cases, Title I extends its benefits equally to *all* eligible children regardless of the school they attend. A child's eligibility for Title I aid depends solely on whether he (1) resides in an area with a high concentration of families below the poverty level, and (2) has an educational deficiency. 20 U.S.C. §§ 2732-34 (1982). (JA 39-42).[37]

Not only is Title I neutral on its face; students attending church-connected schools in fact constitute only a small portion of the class of all Title I beneficiaries. Nationwide, fewer than four percent of the 5.1 million students receiving Title I services attend private schools. (JA 228). In New York City, private school children constitute only 13.2 percent of the children eligible for Title I services, and only 13.5 percent of the funding for Title I services is allocated for services to private school students. (JA 37-38). If, as *Mueller* held, *see* 103 S. Ct. at 3069-70, a facially neutral aid program satisfies the primary effect element of the three-part test regardless of whether a disproportionate percentage of the aid actually flows to church school children, then surely a facially neutral aid program also satisfies this element of the test where such children are in fact only a small part of a large class of beneficiaries.

---

[37] Similarly, whether a child attends public or private school is irrelevant to the level of services he receives. Expenditures for children receiving Title I aid in private schools must be "equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in . . . public schools." 20 U.S.C. § 3806(a) (1982). *See* 34 C.F.R. § 200.71(a) (1983). The record establishes that New York City's Title I program adheres to this requirement. (JA 37-38).

3. *Restriction of Aid to Secular Activities*

In *Meek* v. *Pittenger*, *supra*, the Court expressed concern about "[t]he potential for impermissible fostering of religion" involved in a Pennsylvania on-premises auxiliary services program that had certain of the features of Title I. 421 U.S. at 372. There is no basis for such concern here. The uncontroverted evidence demonstrates that, throughout the 18-year history of the New York City Title I program, aid provided to private school students has been neither diverted for use in religious activities or instruction nor subject to religious influence. Three aspects of New York City's Title I program largely account for this success in restricting Title I aid to secular activities:[38] (1) safeguards

---

[38] The court of appeals acknowledged this success. *See* S.G. App. 4a. Nevertheless, the court observed that "as regards their contention that Title I has not fostered religion, [defendants in the trial court] experience the difficulty always confronted by one having to prove a negative." (*Id.* at 38a). The Court further noted that no amount of evidence offered by defendants could dispel the "possibility" that "in some significant number of instances" a Title I teacher has succumbed to religious influence and fostered religion. (*Id.*)

The court of appeals offered no explanation for this novel allocation of the burden of proof. Surely it is the plaintiff's burden to prove that a challenged statute or program has a "primary effect" that advances religion (or that it fails to satisfy one of the other prongs of the three-part test). *Cf. Hunt* v. *McNair*, *supra*, 413 U.S. at 746-47 n.8. In this case, plaintiffs did not address, much less carry this burden. They offered absolutely no affirmative proof that Title I teachers have ever given religious instruction or otherwise fostered religion or that Title I equipment or materials have ever been diverted to religious use. The court of appeals' attempt to rescue plaintiffs from this evidentiary default—by shifting to defendants the burden of "prov[ing] a negative"—is unwarranted as a matter of law. Just as it cannot be assumed without proof that secular textbooks loaned to students attending private schools—even pervasively sectarian private schools—will be put to religious use, *see Board of Education* v. *Allen*, *supra*, 392 U.S. at 248, so it cannot simply be assumed that Title I services and materials will be put to religious use. In any event, the evidence offered by de-

adopted by the federal government and the Board of Education effectively insulate the on-premises program from private school influence and ensure the program's organizational autonomy and religious neutrality; (2) the private schools on whose premises Title I services are offered in New York City are not "pervasively sectarian;" and (3) Title I teachers and professionals do not perceive those schools to have a dominant sectarian mission or atmosphere and do not alter their instruction in any way because of the religious sponsorship of the schools.

a. The federal regulations implementing Title I impose restrictions designed to confine Title I aid to secular use. For example, the LEA must keep title to and exercise administrative control over all equipment and supplies acquired with Title I funds, 34 C.F.R. § 200.74 (a) (1983), and must provide services to private school children through public employees or independent contractors, *id.* § 200.70(d)(1) (1983). Title I funds may not be used for "[t]he needs of the private schools," *id.* § 200.72(b)(1) (1983), or for "repairs, minor remodeling, or construction of private school facilities," *id.* § 200.75 (1983). These and other federal regulations, *see generally* 34 C.F.R. §§ 200.70 *et seq.* (1983), "create[] the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school." (S.G. App. 14a, *quoting* 1971 Office of Education report).

In addition, the New York City Board of Education has adopted its own set of procedures and safeguards that further strengthen the autonomy of the Title I program and effectively confine Title I aid to strictly secular uses. *See* pp. 8-10, *supra.* For example, Title I teachers are systematically instructed that they are accountable

---

fendants "establishes that Title I personnel *have not* fostered religious views or advanced religious activities." *PEARL, supra* (S.G. App. 97a) (emphasis in original).

only to their Title I supervisors, not to any private school officials; that they have sole responsibility for selecting students for the Title I program and may teach only children who meet the dual eligibility criteria for Title I aid; that they may not engage in team-teaching with private school teachers; and that they may not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. (JA 50-51). *See also* Def. Exh. U. (Tabs A-7, ¶¶ 7-8; A-10, ¶¶ 8-9; A-11, ¶¶ 7-8; A-28, ¶ 8; A-31, ¶¶ 7-8); Tr. 83-86, 115, 125, 130-31, 136, 151-52.[39] The uncontradicted evidence establishes that Title I teachers and professionals understand and adhere to these guidelines, and that they view the Title I program as separate from and independent of the private schools' instructional program. (JA 52). *See, e.g.*, Tr. 115-16, 125-27, 130-31, 151-54.

Equally important, the Board requires that classrooms used for Title I instruction be entirely free of religious objects. (JA 58-59). In intent and effect, these Title I classrooms, which are ordinarily set aside by the host schools exclusively for Title I services, are public classrooms in private schools. (JA 59). *See, e.g.*, Def. Exh. U. (Tabs A-7, ¶ 18; A-8, ¶ 18; A-10, ¶ 22; A-11, ¶ 18).

Finally, teaching materials and equipment used in the New York City Title I program are selected by public employees and can have no religious content. All equipment and materials are labeled as property of the Board, are locked in cabinets in the Title I classrooms when not in use in the Title I program, and are subject to annual inventory. (JA 56-57). As the *PEARL* court concluded, "the publicly owned instructional materials do not support the collective educational enterprise of the parochial school." (S.G. App. 89a).

---

[39] Citations to "Tr." are to the transcript of the evidentiary hearing in *PEARL*.

b. In *Meek* v. *Pittenger*, *supra*, the Court expressed concern that the "potential for impermissible fostering of religion" may arise when government provides "important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371-72. The Court made this observation in the context of schools that:

> "'(1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.'" *Id.* at 356 (*quoting* complaint).

The Court has referred to the hypothetical "profile" of a "pervasively sectarian school" in a number of its cases. *E.g.*, *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 476 (1973); *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 767-68. With respect to such schools, the Court has said there is a "danger that religious doctrine will become intertwined with secular instruction . . . ." *Meek* v. *Pittenger*, *supra*, 421 U.S. at 370.

The church-affiliated schools in New York City where Title I instruction is provided are not "pervasively sectarian" as this Court has used that term in *Meek* and other cases. Specifically, the uncontroverted evidence shows that those schools (1) do not restrict the admission of students on religious grounds; (2) do not restrict

the hiring of teachers on religious grounds; (3) do not place religious limitations on the content of secular instruction; and (4) do not make any effort to compel their students to obey the doctrines and dogmas of the sponsoring church. (JA 71-72). Those schools, many of which are so-called "inner-city" schools that have a substantial percentage of students whose religious affiliation is different from that of the schools, *see* n.16, *supra*, do not have "dominant sectarian mission[s];" nor do they "constantly maintain[]" an "atmosphere dedicated to the advancement of religious belief." *Meek* v. *Pittenger*, *supra*, 421 U.S. at 371. For this reason, as the *PEARL* court concluded, "New York City's use of public school teachers on private school premises does not . . . create the same degree of potential for religious advancement that the *Meek* Court feared would result from placing public employees in pervasively sectarian institutions." (S.G. App. 87a). *Cf. Tilton* v. *Richardson*, *supra*, 403 U.S. at 687.

c. Even if it were assumed, despite the uncontested evidence to the contrary, that New York City's Title I private schools are "pervasively sectarian," as the Court has used that term, the record demonstrates that Title I teachers and professionals do not perceive a dominant sectarian mission or atmosphere in the church-related schools in which they work. The uncontroverted affidavits of Title I teachers establish that these teachers have not been subject to any religious influence or pressure in the course of carrying out their Title I duties and that the religious sponsorship of the schools to which they are assigned has had absolutely no impact on what or how they teach. *See generally* Def. Exh. U. (Tabs A-5 to A-46). Indeed, fairly read, these affidavits are sufficient to allay any reasonable fear that Title I teachers will be induced by the schools' religious mission or affiliation to foster religion in their Title I classes. To persist in that fear in the face of these uncontroverted

affidavits, as the court of appeals did, is to refuse "to distinguish between real threat and mere shadow." *Marsh* v. *Chambers*, *supra*, 103 S. Ct. at 3337.

C. Entanglement

Finally, New York City's Title I program avoids excessive entanglement between government and religion. The program does not entail an excessive administrative relationship between governmental and religious authorities (administrative entanglement); nor does it have a potential for political division along religious lines (political entanglement).

1. Administrative Entanglement

The court of appeals acknowledged that New York City has been "largely successful" in preventing private school Title I teachers and professionals from giving sectarian instruction or otherwise fostering religion. (S.G. App. 4a). The court held, however, that this success has come at too high a price in administrative entanglement of government with religion: the "active and extensive surveillance which the City has provided . . . constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion." (*Id.* at 39a).

The court did not reach this conclusion by examining the actual operation of the New York City Title I program. Instead, the court rested its excessive entanglement holding entirely on *a priori* grounds. As the court read *Meek*, New York City must be "certain" that its Title I teachers do not foster religion,[40] and, in the na-

---

[40] The *Meek* Court did emphasize *Lemon's* conclusion that government must " 'be certain . . . that subsidized teachers do not inculcate religion.' " 421 U.S. at 369. But, as one commentator has noted, "[i]t seems doubtful that the *Lemon* Court meant this language to be taken literally . . . . Certainty is an impossible standard to meet and one the Court might hesitate to apply consistently. Even in a public school, the state cannot be at all certain that a teacher will not 'inculcate religion.' " *The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 47, 108 (1975). For example, a

ture of things, such "certainty" can be had only through surveillance so active and extensive as *necessarily* to amount to "excessive entanglement." (S.G. App. 36a-39a). It follows, on this reasoning, that remedial instruction on the premises of church schools is *per se* unconstitutional.

The record in this case, however, demonstrates—with all the certainty that the subject permits—that New York City *has* succeeded in providing on-premises remedial instruction without either fostering religion or excessively entangling church and state. The court of appeals discounted that record, holding in effect that New York City simply *cannot* have done what the record clearly and unequivocally shows that it *has* done. Nothing in *Meek* v. *Pittenger*, *supra*, or this Court's other cases, compels a result so plainly at odds with logic and common sense.

The reasons why New York City has succeeded where others have failed, *see, e.g.*, *Lemon* v. *Kurtzman*, *supra*, are not hard to find. They are comprehended in the three factors that the Court has considered in determining whether a program entails excessive administrative entanglement: "(1) the character and purposes of the benefited institutions, (2) the nature of the aid provided, and (3) the resulting relationship between the State and the religious authority." *Roemer* v. *Board of Public Works*, *supra*, 426 U.S. at 748.

(a) *Institutions Affected*

In finding a potential for excessive entanglement in Pennsylvania's "auxiliary services" program in *Meek*,

---

public school can scarcely be "certain" that its teachers will not foster religion while teaching the Bible as literature or history. But such teaching is undoubtedly constitutional. *See Abington School District* v. *Schempp*, *supra*, 374 U.S. at 225. *Cf. Committee for Public Education* v. *Regan*, *supra*, 444 U.S. at 656, 662 (reimbursement scheme upheld because it created no "substantial" or "appreciable" risk of being used to transmit or teach religious views).

the Court relied heavily on the fact that the services were being provided "in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371. Similarly, in invalidating state teacher salary programs in *Lemon* v. *Kurtzman, supra*, the Court placed great weight on the pervasively sectarian nature of the schools involved. 403 U.S. at 615-20. *Compare Tilton* v. *Richardson, supra*, 403 U.S. at 685-87; *Roemer* v. *Board of Public Works, supra*, 426 U.S. at 762-65. Since New York City's Title I private schools are not pervasively sectarian, as that term was used in *Meek*,[41] the need for continuing surveillance to guard against the danger of impermissible fostering of religion is "correspondingly reduced." (S.G. App. 96a).

(b) *Form of Aid*

As the *PEARL* court noted, the "nature of the aid provided by Title I and the structure of New York City's program [also] militates against church-state entanglement." (S.G. App. 96a). *First*, Title I educational services are provided directly to eligible private school children by public employees under public supervision, and no Title I funds are disbursed to the schools themselves or their teachers. This sharply distinguishes Title I from the teacher salary programs invalidated in *Lemon* v. *Kurtzman, supra*, where private religious schools and teachers were required, as a condition of financial assistance, to surrender to the state significant control over their *own* curricula and teaching practices. *See* 403 U.S. at 635-37 (Douglas, J., concurring); *id.* at 651 (opinion of Brennan, J.). In contrast, the New York City private schools on whose premises Title I services are provided make no promises about what or how their *own* employees will teach. What goes on in private school classrooms other than the one in which Title I services are provided is thus no part of New York City's concern. Conse-

[41] See pp. 36-37, *supra*.

quently, there is no need whatsoever for "comprehensive, discriminating, and continuing state surveillance," *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619—no need to put "a public investigator into every classroom," *id.* at 627 (Douglas, J., concurring), or to have "state inspectors prowling the halls," *id.* at 650 (opinion of Brennan, J.), or to examine the contents of private school courses or textbooks or ledgers.

To be sure, the private schools do undertake to make available for Title I use a classroom space that is free of religious objects. But this undertaking is straightforward and unambiguous and can easily be verified without surveillance or intrusion into the school's educational activities or internal operations.[42] What is more important, this promise runs only to a single classroom; it does not in any way compromise or thwart the private school's freedom to teach what it wants and how it wants elsewhere in the school. It is a promise, in short, unlike those exacted by Rhode Island and Pennsylvania in *Lemon*, that requires no special policing to enforce and that does not diminish the private school's freedom to pursue its educational and religious missions as it sees fit.

Second, unlike the Pennsylvania auxiliary services program invalidated in *Meek*, the New York City Title I program has been carefully structured to prevent the impermissible fostering of religion. Whereas Pennsylvania relied "entirely on the good faith and professionalism" of the auxiliary services teachers to ensure religious neutrality, 421 U.S. at 369, New York City has not been so "complacent." *Meek* v. *Pittenger*, 374 F. Supp. 639, 673 (1974) (Higginbotham, J., dissenting). It has in-

---

[42] One would have to attribute bad faith to the private school administrators to assume that they would attempt to display religious symbols in a room where they have agreed not to do so. *Cf. Committee for Public Education* v. *Regan*, *supra*, 444 U.S. at 660-61. In any event, no surveillance is necessary to ensure compliance because the Title I teacher would notice any religious symbol or object that somehow found its way into his classroom.

stead, as previously discussed, *see* pp. 8-10, 34-35, *supra*, adopted a set of procedures and safeguards designed to insulate the Title I program from private school influence or control and to assure that religion is not fostered or supported. The fact that Title I classrooms are ordinarily set aside exclusively for Title I use and are entirely free of religious objects brings home to Title I teachers with daily force that they are in, but not of, the private schools to which they are assigned. This is further reinforced by the fact that Title I teachers ordinarily are itinerant and generally are of a religious faith different from the schools in which they teach. *See Wheeler* v. *Barrera*, *supra*, 417 U.S. at 426.

These precautionary measures have had their intended effect. "[T]he undisputed testimony of numerous Title I personnel demonstrates that they strictly adhere to the regulations restricting their own activities and use of materials, and that they view their role as independent of the nonpublic schools' instructional program." *PEARL*, *supra* (S.G. App. 97a). The record further shows that since the program's inception in 1966, there has not been a single known instance of any Title I teacher or professional introducing religious topics into the Title I classroom, becoming involved in the religious activities of the private schools, or being pressured by private school personnel to compromise the total independence of the secular Title I program.

In short, the record demonstrates that on-premises instruction by Title I teachers in New York City presents no cognizable risk of "impermissible fostering of religion." There is, therefore, no need for the type of "continuing surveillance"—and the resulting entanglement—feared in *Meek*.

(c) *Relationship Between the Government and the Religious Authority*

As shown above, the nature of the schools involved and the form in which Title I aid is provided eliminate the

need for any administrative relationship between government and religious authorities that would intrude one into "the precincts of the other." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614. The record further demonstrates that there is in fact no such entangling relationship between government and religious authorities. New York City has not engaged in "extensive state investigation into church operations and finances," *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 691 (Brennan, J., concurring), or in "difficult classifications of what is or is not religious," *id.* at 698 (opinion of Harlan, J.), or in "inspection and evaluation of the religious content of a religious organization," *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 620. On neither one side nor the other has there been any loss of autonomy or compromise of mission, and certainly no "spectre of governmental 'secularization of a creed'" has been raised. *Id.* at 650 (opinion of Brennan, J.). There has been no confrontation, conflict, or strife. The relationship between government and religious authorities has been limited, routine, and trouble-free.

The record reveals two types of administrative relationships arising out of New York City's private school Title I program: (1) supervision of Title I teachers and professionals by Title I and other public administrators, and (2) routine administrative contacts between Title I and private school personnel. The first relationship is exclusively between public employees, not between the government and any religious authority. The second relationship is between the government and religious authorities, but it involves neither supervision nor surveillance and plainly does not amount to *excessive* government entanglement with religion.

1. The only form of supervision involved in the private school Title I program is supervision of *public* school employees by other *public* employees. *Compare* *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614-22. Such supervision does not entangle church and state; indeed, the supervision of some public employees by other pub-

lic employees does not involve the government and the religious authority in any relationship at all.[43] To be sure, this supervision may, on occasion, take place on the physical premises of the private school. But even then it is confined to the Title I classroom that is separate and distinct from the facilities used by the private schools for their own instructional activities.[44] On their occasional visits to observe the Title I teacher, Title I supervisors do not "prowl[] the halls" of the private schools, *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 650 (opinion of Brennan, J.), or visit other classrooms, or involve themselves in the internal operations, curricula, or administration of the private schools. Their visits are as short-lived and unintrusive as those of fire and building safety code inspectors.

In *Wolman* v. *Walter*, *supra*, the Court upheld off-premises instruction of private school students by publicly employed teachers, reasoning as follows:

---

[43] The supervision involved in this case is no more than what is in practical effect mandated by *Abington School District* v. *Schempp*, *supra*, which held that publicly employed school teachers may not engage in religious activity in public schools. Enforcement of this restriction necessarily requires some form of public supervision of public school teachers, wherever they teach.

In *Lemon* v. *Kurtzman*, *supra*, the Court was concerned with *public* supervision of *private* school teachers, who were subject to the religious authority of the private schools and who themselves, in many cases, were dedicated religious persons. *See* 403 U.S. at 615-19. The Court feared that this supervision would inevitably involve the government closely with the inner workings and policies of the private school and would lead to disputes between the government and religious authorities over what is religious and what is not. These concerns are completely foreign to the supervision of publicly employed Title I teachers and professionals by publicly employed administrators.

[44] Typically, a Title I classroom is set aside exclusively for Title I use and has a hand-lettered sign on the door identifying it as a facility reserved for Title I activities. (JA 59). It is free of religious statues, symbols, pictures, and artifacts. (*Id.*)

> "It can hardly be said that the [public] supervision of public employees performing public functions on public property creates an excessive entanglement between church and state." 433 U.S. at 248.

In effect, the Title I facility is a public school within a private school, unaffected by the fact that the private school may be sponsored by or affiliated with a religious denomination. (JA 59). Public supervision of public employees performing public functions in this setting is indistinguishable for Establishment Clause purposes from the supervision approved by *Wolman* and does not constitute excessive entanglement between church and state. What matters is not that the Title I classroom in which the supervision takes place is formally[45] and physically part of the religious school, but rather that (1) the supervision entails no relationship at all with religious school personnel, leaving them entirely free within their sphere, and (2) the Title I classroom is functionally indistinguishable from a classroom in a public school in that it is under the *de facto* control and subject to the exclusive use of the Title I teacher and has a religiously "neutral" atmosphere.

2. Of course, general administration of the private school Title I program necessarily involves some routine contacts between private school officials and Title I ad-

---

[45] If New York City had leased the classrooms in which Title I instruction is provided from the private schools, those classrooms would be public school property under the control and operation of public school authorities. Under such arrangements, the New York City private school Title I program would presumably be constitutional under the Court's analysis in *Wolman* as well as Justice Brennan's analysis in *Nebraska State Board of Education* v. *School District of Hartington*, 409 U.S. 921, 924-26 (Brennan, J., concurring), *denying cert. to* 188 Neb. 1, 195 N.W.2d 161 (1972). The constitutionality of Title I certainly cannot turn on the formality of whether a lease is actually signed. Whether the classrooms are leased by New York City—and thereby technically become "public property"—is irrelevant to the concerns of the Establishment Clause.

ministrators. The record discloses that these contacts fall into three categories: (1) dissemination by Title I administrators of basic information about the program (JA 59-60); (2) submission by private school principals for review by Board of Education officials of standard form requests for Title I services (JA 60-61); and (3) responses by Title I administrators to inquiries about scheduling and like matters. (JA 61). These contacts are "straightforward" and routine. *See Committee for Public Education* v. *Regan*, *supra*, 444 U.S. at 660. They do not give private school officials any control or authority over the implementation of the private school Title I program, they do not involve Title I administrators in the internal affairs of the private schools, and they never involve matters of a religious nature. New York City officials do not audit the records of church-related schools, *compare Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 621-22, do not engage in "negotiations" with private school authorities, *compare Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 39-40 (D.N.J. 1973), *summarily aff'd*, 417 U.S. 961 (1974), and do not "inquire into the religious procedures and curricula" of the private schools, *id.* at 40.

Implementation of Title I also involves certain limited and routine contacts between Title I teachers, on the one hand, and private school teachers and administrators, on the other. Title I teachers assigned to private schools have occasional contacts with the principals of these schools. The record demonstrates, however, that these contacts are strictly professional and never involve any religious matter. Def. Exh. U. (Tabs A-7 to A-32, A-36 to A-46). They are largely confined to discussion of scheduling problems, eligibility for Title I services, and the progress of individual students. (*Id.*) As the *PEARL* court found, the New York City program has been carefully designed to avoid uncertainty and controversy over the nature of the Title I teachers' responsibilities. (S.G. App. 100a). Because these responsibilities are clearly

defined, both the Title I teachers and the private school officials fully understand their nature and limits. The private school administrators view Title I as a separate and independent program, over which they have no control or authority. Def. Exh. U. (Tabs A-49 to A-54).

While Title I teachers assigned to private schools have more frequent contacts with private school teachers, the record shows that these contacts are also purely professional. They concern the educational needs of students eligible for Title I services and the progress of students actually receiving such services. *See* n.15, *supra*. The Title I teachers and private school teachers never discuss matters of a religious nature. Def. Exh. U. (Tabs A-7 to A-32, A-36 to A-46).

In sum, administration of the private school Title I program involves no "intrusion of either [church or state] into the precincts of the other," *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614, and generates no controversy of the sort feared in *Meek*. As Justice Brennan has written concerning a somewhat similar Title I program in Nebraska:

> "[T]he school district [has] no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses . . . operate completely independently of that curriculum and of the Catholic school administration." *Nebraska State Board of Education* v. *School District of Hartington*, *supra*, 409 U.S. at 926.

The New York City Board of Education has concluded that the only practical way to provide remedial instruction to needy private school children is to provide that instruction on the premises of the private schools. The administrative contacts between the Board and the private schools are minimal: they are limited to what is practically necessary to handle logistical problems in the

implementation of the program.[46] "Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman* v. *Walter*, *supra*, 433 U.S. at 247 n.14. New York City's Title I program does not put public officials in the position of policing the teaching practices of church-related schools, or otherwise dictating or meddling in their internal affairs. And it certainly does not involve "the 'comprehensive, discriminating, and continuing state surveillance' necessary to run afoul" of the proscription of excessive adminstrative entanglement. *Mueller* v. *Allen*, *supra*, 103 S. Ct. at 3071, *quoting* *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619 (citation omitted).

2. *Political Entanglement*

Nor is there any basis for a finding that Title I fosters excessive political entanglement. The Court has held that no inquiry into political entanglement "is even called for" unless an aid program provides "a direct subsidy to church-sponsored schools or colleges, or other religious institutions." *Lynch* v. *Donnelly*, *supra*, 104 S. Ct. at 1364-65; *see Mueller* v. *Allen*, *supra*, 103 S. Ct. at 3071 n.11. Since Title I does not provide such subsidies, there is no need to consider any question of political entanglement.

In any event, because Title I is a federal program with both a "diverse and widely dispersed" constituency, *Til-*

---

[46] Indeed, the contacts inherent in an on-premises program are *less* extensive than those that would be required to administer an off-premises program for private school students. Tr. 97-98. The fact that the relief sought by plaintiffs in this case would *increase* the administrative contacts between public and religious officials speaks strongly against a finding of "excessive" entanglement. *See* *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674 (elimination of property tax exemptions would increase rather than diminish the extent of state involvement with religion).

ton v. *Richardson*, *supra*, 403 U.S. at 689, and a nationwide class of beneficiaries only 4 percent of whom attend private school (JA 228), it is most unlikely to generate continuing political debate about "aid to religion."[47] As the Court explained in *Nyquist*, "in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class [is] an important factor." 413 U.S. at 794.

Furthermore, Title I has not in fact occasioned such divisiveness since its enactment in 1965. Although there have been annual appropriations by Congress and occasional statutory amendments, there is absolutely no evidence of any "continuing religious aggravation" in this process. *Tilton* v. *Richardson*, *supra*, 403 U.S. at 688.[48] Federal assistance to all needy children under Title I has long been an accepted goal in this country, and there is no indication of any religious controversy over that goal in the future.

---

[47] In contrast, the auxiliary services program for private school students at issue in *Meek* was embodied in a separate statute, and the legislature considered appropriations for the program independently of appropriations for the public schools. 421 U.S. at 352, 372. As a result, the amount of aid to be provided to private school students would have been a subject of recurring controversy, creating "the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program [and] . . . political fragmentation and division along religious lines." *Id.* at 372.

[48] In fact, Title I effectively put an end to decades of controversy about federal aid to education. *See generally*, Kelley and Lanoue, *The Church-State Settlement in the Federal Aid to Education Act*, 1965 Religion and the Public Order 110. To undo this settlement, the terms of which have proved stable and enduring, would end the peace, not secure it.

CONCLUSION

Title I is the federal government's commitment to assist economically and educationally disadvantaged children. It is one of the largest and most successful of the federal educational aid programs. In New York City alone, tens of thousands of economically and educationally disadvantaged children have benefited since the program's inception. Evaluation reports have consistently found that children participating in the program show measurably significant improvement in overcoming their learning disabilities. (JA 68-70).

In attempting to achieve the secular purpose of providing remedial educational aid to needy children, the federal government acted with scrupulous religious neutrality by extending Title I services to all students regardless of where they attend school. The statutory and regulatory restrictions on the use of Title I funds ensure that Title I aid neither advances nor inhibits religion, and that Title I personnel do not become impermissibly entangled with the operations of private schools. The record emphatically demonstrates that New York City's private school Title I program does not offend the values protected by the Establishment Clause.

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES H. WILSON
Counsel of Record
MICHAEL P. MADOW
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Appellants